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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

FEDERAL TRADE COMMISSION, STATE
OF ARIZONA, STATE OF CALIFORNIA,
DISTRICT OF COLOMBIA, STATE OF
ILLINOIS, STATE OF MARYLAND, STATE
OF NEVADA, STATE OF NEW MEXICO,
STATE OF OREGON, and STATE OF
WYOMING,

Plaintiff,

vs.

THE KROGER COMPANY and
ALBERTSONS COMPANIES, INC.,

Defendants.

Case No. 3:24-CV-00347-AN

**NON-PARTY RALEY'S HOLDING
COMPANY'S AND RALEY'S ARIZONA
LLC'S UNOPPOSED MOTION TO SEAL
EVIDENTIARY HEARING EXHIBITS
PX8062 AND PX4083**

MOTION TO SEAL

LR 7-1 CERTIFICATION

Pursuant to LR 7-1(a), counsel for non-parties Raley's Holding Company and Raley's Arizona, LLC ("Raley's Arizona") (collectively, "Raley's") has consulted telephonically with the parties about this motion; Plaintiffs and Defendants have confirmed that this motion is unopposed.

UNOPPOSED MOTION

In accordance with the Court's Order Regarding Sealing Evidentiary Exhibits (ECF No. 263), non-parties Raley's Holding Company and Raley's Arizona, LLC ("Raley's Arizona") (collectively, "Raley's") move to seal two exhibits that Plaintiffs have indicated they may use at the upcoming preliminary injunction evidentiary hearing: PX8062 and PX4083. In particular, Raley's requests that this Court seal: (1) the entirety of PX8062, a four-page internal pricing strategy document used by Raley's Arizona in competing against Defendants in Arizona; and (2) pages 168:19-178:19 of PX4083, which involves deposition testimony discussing the substance of PX8062. This Motion is supported by the declaration of Keith Knopf ("Knopf Declaration"), the President and CEO of the Raley's Holding Company, filed contemporaneously with this motion.

RELEVANT BACKGROUND

I. Raley's Holding Company Competes Against Defendants

The Raley's Holding Company is a private, independently family-owned, 90-year-old company headquartered in West Sacramento, California that owns a portfolio of operating companies that manage grocery stores and digital assets in multiple states in the Western United States. Knopf Decl., ¶ 3. In total, Raley's Holding Company's operating companies operate 230 supermarket locations under various banners in California, Nevada, Arizona, New Mexico, and the Tribal Nations of the Navajo, Apache, and Tohono O'odham. *Id.* ¶ 4. As part of a 2021 acquisition, the Raley's Holding Company formed Raley's Arizona to acquire the assets of Bashas'

Family of Stores. *Id.* ¶ 7. Raley’s Arizona currently includes five banners: Bashas’, Bashas Diné, Food City, AJ’s Fine Foods, and Eddie’s Country Stores. *Id.*

Primarily, the Raley’s Holding Company’s supermarket locations are full-line, conventional grocery stores, which offer a wide variety of quality-priced products, are typically located in neighborhood areas, are well-staffed and well-maintained, and compete on a high/low pricing posture. *Id.* ¶ 5. The store format and layout, product assortment, and services provided by Raley’s Holding Company’s conventional grocery stores is highly similar—if not practically synonymous—with conventional grocery stores operated under the banners of Defendants The Kroger Company (“Kroger”) and Albertson’s Companies, Inc. (“Albertson’s”), including in several of the same geographic areas where the Raley’s Holding Company operates. *Id.* ¶ 6. For example, Raley’s Arizona operates 43 Bashas’ grocery stores as traditional, full-line, conventional supermarkets in Arizona. *Id.* ¶ 8.¹

Raley’s Arizona’s banner stores, such as Bashas’, compete directly against a Kroger’s banner, Fry’s, and two Albertsons’ banners, Albertsons and Safeway. *Id.* at ¶¶ 13-14. Fry’s, Albertsons, and Safeway encompass the same trade areas where Raley’s Arizona’s banner stores operate and provide similar product assortment, store format, and services as Raley’s Arizona’s conventional grocery stores. *See id.* Similarly, Raley’s Holding Company’s banner stores compete directly against: (1) Albertsons’ banner Safeway and Kroger’s banner Food 4 Less in Northern

¹ With respect to the other Raley’s Arizona banners, Bashas’ Diné are highly similar in product assortment, store layout, and services as Bashas’ but are entirely located on tribal land and feature products that are of interest to Native American communities. Knopf Decl., ¶ 9. Food City is a value-priced supermarket that features a high preponderance of first or second generation Northern Mexican ethnic products, though the store size and quantity of different products is similar to Bashas’ stores. *Id.* ¶ 10. AJ’s Fine Foods is a physically smaller grocery store that features gourmet and high-service offerings. *Id.* ¶ 11. Eddie’s Country Store is essentially a corner market in a relatively rural tourist destination area. *Id.* ¶ 12.

California; and (2) Albertson's banner Safeway and Kroger banner Smith's in Nevada. *Id.* ¶ 15.

II. The Raley's Holding Company and Raley's Arizona Have Provided Highly Confidential Documents and Testimony in Connection with this Matter.

On March 6, 2023, the FTC served Raley's Arizona with a Civil Investigative Demand (the "CID") relating to its investigation of Defendants' proposed merger. Raley's Arizona subsequently produced documents to the FTC to comply with the CID, including PX8062—a highly-sensitive, 2023 document used for purposes of pricing strategy by Raley's Arizona. *Id.* ¶ 17; Ex. 1 (copy of PX8062, filed under seal).² In particular, PX8062 reflects the process, methods, and various benchmarks used by Raley's Arizona to establish prices at the five different Raley's Arizona banners and for different categories of products (such as, for example, private label products). Knopf Decl., ¶ 18. The document describes in specific detail:

- Quantitative measures and rules for how the Raley's Arizona banner stores price against their direct competition at Safeway, Albertsons, and Fry's, for different categories of stores and different categories of products. *Id.* ¶ 19.
- Benchmarks on where different categories of Raley's Arizona stores and products should rank in terms of pricing and as compared to competitor stores in the market, including Safeway, Albertsons, and Fry's. *Id.* ¶ 20.

² Because PX8062 is a highly-sensitive pricing strategy document produced in response to an FTC investigation, this document should be treated as Highly Confidential Material under Paragraph 2 of the Stipulated Protective Order in this matter. (*See* ECF No. 97 at 4 ("Any Document or portion thereof submitted by a Defendant or a nonparty during an FTC investigation . . . that is entitled to confidentiality under the Federal Trade Commission Act, or any federal or state statute or regulation, or under any federal court or Commission precedent interpreting such statute or regulation . . . shall be treated as Highly Confidential Material for purposes of this Protective Order").) Of note, PX8062 contains the word "Confidential" at the bottom of each page, and Raley's Arizona included the word "Confidential" in the title of the document when it produced PX8062 in response to the FTC's CID.

- Raley Arizona’s strategy for pricing different categories of products based on how consumers perceive the products or the type of value messaging that Raley’s Arizona seeks to convey to its customers. *Id.* ¶ 21.
- Quantitative data on target profit margin goals in different product categories. *Id.* ¶ 22.

This information in PX8062 reflects highly-confidential trade secrets that are closely guarded by Raley’s Arizona. *See id.* ¶ 24. Indeed, Raley’s Arizona is currently employing many of the highly confidential pricing strategies that are reflected in PX8062. *Id.* ¶ 25. The public disclosure of PX8062 would thus cause significant competitive harm to Raley’s Holding Company and Raley’s Arizona because the document would provide to competitors, including Kroger and Albertson’s, comprehensive understanding of how Raley’s Arizona determines pricing, margins and reacts to competitive price changes. *Id.* ¶¶ 26-27.

On June 5, 2024, the parties deposed Mr. Knopf, the President and CEO of the Raley’s Holding Company, in connection with this litigation. During that deposition, Mr. Knopf was asked about PX8062. *Id.* ¶ 28. After generally describing the nature of this document and its sensitive nature, Mr. Knopf was specifically asked about and testified regarding the substance of PX8062 at pages 168:19-178:19 of PX4083. *Id.*; Ex. 2 (excerpts of PX4083, filed under seal).

A few months later, Plaintiffs gave notice to Raley’s that they might use four exhibits relating to Raley’s Holding Company and/or Raley’s Arizona in the upcoming preliminary injunction hearing, while Defendants gave notice to Raley’s of potential use of three exhibits. Plaintiffs’ list included, among other documents, PX8062 and PX4083. Plaintiffs have also indicated their intent to call Mr. Knopf as a witness on August 29, 2024.

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ARGUMENT

In the Ninth Circuit, courts apply a “compelling reasons” standard to seal judicial records in light of the “strong presumption” favoring public access. *Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1175 (9th Cir. 2006). Still, the Ninth Circuit has found a number of “compelling reasons” to seal judicial records, such as when public disclosure would “release trade secrets.” *Id.* at 1179. “[C]ourts have refused to permit their files to serve as . . . sources of business information that might harm a litigant’s competitive standing.” *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 598 (1978).

Accordingly, “a trial court has broad discretion to permit sealing of court documents for, inter alia, the protection of a trade secret or other confidential research, development, or commercial information.” *San Diego Detox, LLC v. Detox Ctr. of San Diego LLC*, 2024 WL 2059737, at *1 (S.D. Cal. May 8, 2024) (cleaned up). “Additionally, courts have been willing to seal court filings containing confidential business material” under the compelling reasons standard, *id.*, including a company’s “confidential financial and pricing information.” *Quidel Corp. v. Siemens Med. Sols. USA, Inc.*, 2020 WL 1062949, at *2 (S.D. Cal. Mar. 4, 2020); *see also Selling Source, LLC v. Red River Ventures, LLC*, 2011 WL 1630338, at *1 (D. Nev. Apr. 29, 2011) (“It is well-settled that the court has the authority to shield proprietary information related to the ongoing operations of a business from public review.”).

Further, in this case, Plaintiffs have correctly noted that “courts regularly consider the status, and associated limitations of nonparties to a litigation when protecting the nonparties’ confidential business information.” (ECF No. 229 at 2 (citing *United States v. Dentsply Intern., Inc.*, 187 F.R.D. 152, 160 n.7 (D. Del. 1999), and *Broadcasting Co. v. Dish Network*, 2015 WL 12765545, at *3 (C.D. Cal. Jan. 12, 2015) (“Granting protective orders to non-parties to protect

their trade secrets and confidential information does not offend the public interest in disclosure.”).)

Here, non-parties Raley’s Holding Company and Raley’s Arizona have established compelling reasons to seal the entirety of PX8062 and the specific excerpts of PX4083—namely, pages 168:19-178:19—that discuss the substance of the pricing strategy information in PX8062. As detailed above and in the accompanying declaration of Mr. Knopf, Raley’s Holding Company’s conventional grocery stores compete directly against Defendants in Arizona, as well as in California and Nevada. *See* Knopf Decl., ¶¶ 6, 14-15. PX8062, and the associated deposition testimony in PX4083, reveal the internal pricing strategies used by Raley’s Arizona in the course of this competition in Arizona, including detailed quantitative measures and benchmarks for how Raley’s Arizona banner stores set their prices in comparison to Kroger’s and Albertson’s banner stores. *See id.* ¶¶ 17-20. PX8062 further discloses highly-sensitive, strategic information on how Raley’s sets prices based on consumer perception and value messaging, as well as quantitative data on target profit margin goals in different product categories. *See id.* ¶¶ 21-22.

PX8062 is also current: the document is from 2023 and Raley’s Arizona is currently employing many of the highly confidential pricing strategies that are reflected in the document. *See id.* ¶¶ 16, 25. Raley’s Arizona does not disclose its pricing strategies to the public, and the public disclosure of this confidential business information due to this litigation—including to the Defendants who are the direct competitors of Raley’s Arizona—would cause significant competitive harm to the Raley’s Holding Company and Raley’s Arizona. *See id.* ¶¶ 24, 26-28.

Lastly, because Raley’s Holding Company and Raley’s Arizona are non-parties to this litigation, protecting their confidential business strategies from public release will “not offend the public interest in disclosure.” *Broadcasting Co.*, 2015 WL 12765545, at *3.

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CONCLUSION

For the reasons stated above and in Mr. Knopf's accompanying declaration, non-parties Raley's Holding Company and Raley's Arizona respectfully request that this Court seal: (1) PX8062 in its entirety; and (2) pages 168:19-178:19 of PX4083.

Dated: August 20, 2024

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